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LANDLORD AND TENANT

I

IN *Bergeron* v. *Forest*,[1] the Massachusetts law as to the liability of a landlord for injuries received by a tenant through the defective and dangerous condition of the interior of the premises, is stated as follows:

"The defendant as landlord cannot be held liable unless he has undertaken to make repairs and has made them negligently. (1) If he does this by virtue of some contract with the tenant, whereby during the tenancy either repairs or changes are made in the demised premises, the right of recovery is not limited to the tenant personally but includes all persons who within the contemplation of the parties were to use the premises under the hiring. *Feeley* v. *Doyle*, 222 Mass. 155, 157. (2) But if the landlord does this gratuitously, he is liable only to the tenant or person with whom he makes the gratuitous undertaking. *Thomas* v. *Lane*, 221 Mass. 447. *Gill* v. *Middleton*, 105 Mass. 477. In the first class of cases, that is to say, where the landlord makes repairs under contract, he is liable for ordinary negligence. *Galvin* v. *Beals*, 187 Mass. 250. In the second class of cases, that is to say, where the landlord makes repairs gratuitously, he is liable only for gross negligence, *Massaletti* v. *Fitzroy*, 228 Mass. 487, 509;[2] . . . By way of precaution it may be

[1] 233 Mass. 392, 398 124 N. E. 74 (1919).

[2] "Except in those instances where death is caused by such act of negligence, when, liability for death being wholly statutory, under the terms of R. L. c. 171, § 2, as amended by St. 1907, c. 375, a landlord, as well as others, causing the death of a human being by negligence, is subject to the penalty there provided for ordinary negligence. Brown *v.* Thayer, 212 Mass. 392, 397, 398. Flynn *v.* Lewis, 231 Mass. 550. But the class of persons for whose death a landlord may be subject to a penalty is not enlarged beyond the class to whom he is liable for gross negligence in causing conscious suffering, because, as is pointed out in the full discussion in Thomas *v.* Lane,

added that, if the landlord does an act of gratuitous repair which creates a situation inherently dangerous, such as the presence of explosives without notice and such like conditions, there may be liability under the principle elucidated with full review of decisions in *Thornhill* v. *Carpenter-Morton Co.*, 220 Mass. 593."[3]

In *Thomas* v. *Lane*, cited by the Chief Justice, the celebrated case of *Winterbottom* v. *Wright* is construed as holding that one, other than a landlord, who for a consideration and in the course of his trade contracts to make repairs upon a building or chattel, and who makes such repairs negligently, is liable only to him with whom he has contracted, and that case, as so construed, is stated to be the law of Massachusetts.

The effect of the law so announced, applied to facts which might readily arise, is to say the least startling. A builder and contractor owns a shop which he lets to a tenant; the tenant complains that the floor of the shop has fallen into a dangerous state of disrepair. If the landlord, without more, as a mere favor to a desirable tenant, undertakes to do the work and does it with merely ordinary negligence, he is liable to no one. If, on the other hand, the repairs are done with gross negligence, whether by himself or by his servants or perhaps even by an independent contractor carefully selected by him, he is liable to the tenant and perhaps also to the wife of the tenant if she accompanies her husband in his visit to the landlord and joins in the complaint and is present when he promises to make the repairs.[4]

If, however, the tenant goes beyond mere complaint and threatens to exercise a right given him in his lease to terminate his tenancy, or, his lease being about to expire, warns the landlord that he will

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221 Mass. 447, with ample citation of authorities, there is no duty arising out of a gratuitous undertaking of repairs by a landlord to anybody except to the person or persons with whom the gratuitous undertaking was directly made. There can be no negligence unless there is a duty. Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation due to the person sustaining injury. Minor *v.* Sharon, 112 Mass. 477, 487. Lebourdais *v.* Vitrified Wheel Co., 194 Mass. 341. Bernabeo *v.* Kaulback, 226 Mass. 128, 131. Mammott *v.* Worcester Consolidated Street Railway, 228 Mass. 282, 284. Savings Bank *v.* Ward, 100 U. S. 195, 202, 205."

[3] Rugg, C. J., at p. 398, 399.

[4] It would seem also that a similar liability should exist to any other member of the household, or to any other person interested in the safety of the shop, such as a habitual customer who accompanied the tenant and was present when the promise was given.

not renew it unless the repairs are made,[5] the landlord's liability is enlarged both in the character of the negligence for which he is liable and in the persons to whom he is liable. He is liable if the repairs are made with ordinary negligence and he is liable not only to the tenant and to his household but also to "all persons who within the contemplation of the landlord and the tenant were to use the premises under the lease"; in other words, to all those whom the tenant chooses to permit or invites to enter, unless the lease contains a provision that he must exclude certain classes of persons or may not put the demised property to certain uses which involve their admission.

But if the landlord is not frightened by the threat or does not care whether the tenant terminates his lease or not, and the tenant thereupon employs him as builder and contractor to do the work as any other builder and contractor would, agreeing to pay for it, the landlord, as contractor, no matter whether he was guilty of ordinary or gross negligence in making the repairs, is answerable only to the tenant, after the tenant has accepted the repairs as complete. And this is so, though the danger negligently created could not have been discovered after the work was done by anything short of tearing the whole job to pieces. Yet the repairs would in each case have been done by the builder's regular force of workmen under his own direction or the direction of his regular foreman.[6]

It may well be that the fact that the repairs are made for a valuable consideration may properly increase the degree of care required or even the amount of skill which must be exercised by him who undertakes the work, though where the person gratuitously

[5] If the tenant has no right to terminate the lease, a promise to repair made to prevent him from carrying out a threat to do so is held to be without consideration. Hart *v.* Coleman, 192 Ala. 447, 68 So. 315 (1915).

[6] Indeed, it is possible to suggest a case in which it might be doubtful in which capacity he acted. Suppose in the case given above, the landlord refuses to make the repairs at his own expense, the tenant refuses to pay the ordinary rates charged by contractors and persists in his threat to vacate the premises. The builder-landlord suggests and the tenant accepts as a compromise, the proposition that the builder-landlord will make the repairs at cost. In such case, what is his position? Does he act as builder, liable only to the tenant, or does he act as landlord, liable also to the tenant's family and his business and social guests?

Probably he would be held to act as landlord, since the only benefit which he receives other than that of finding work for his force, (though if business is slack even contractors find it worth while to take contracts very close to cost,) is the retention of a tenant.

undertaking such repairs is himself a man whose business requires him to possess special skill, there is less reason to excuse unskilfulness even in a gratuitous undertaking.

But there is no principle general either to the law of contracts or of torts which justifies extending the liability of a landlord making repairs for a benefit moving to him as such, to persons to whom he would not be liable if he made the same repairs gratuitously, and to whom a contractor or even he himself, if acting as contractor, would not be liable, if he had undertaken the work for reward in the course of his business as contractor.

If the obligation to exercise care in making repairs arises out of the undertaking, and is the creature exclusively of the consensual act of giving the promise, while there may be a doubt as to the propriety of regarding such an undertaking, if gratuitous, as *in pari materia* with the true contract, such an undertaking, for a consideration, has far more if not all of the attributes of a perfect contract. Therefore, it seems clearly erroneous to apply to the former that fundamental principle of the law of contracts, which restricts liability to those party to the consideration, while refusing to apply it to the latter.

And since the landlord as such owes no duty to keep the interior of the demised premises in a condition safe for use and therefore the landlord's undertaking, whether gratuitous or for hire, does not define a previously existing relational obligation, it seems equally erroneous to impose on him, if he undertakes the repairs, a wider liability than is imposed upon any other person who improperly performs a similar undertaking for a consideration other than a benefit as landlord.

If the liability for negligent repairs gratuitously undertaken by a landlord is not based upon his failure to confer the benefit which a perfect performance would give, but upon his misfeasance, it is not in its essence a Contract but a Tort liability. As such its extent should be determined by the principles general to that part of the law which deals with the liabilities of those who by their actions create a risk of harm to others which results in injury. And it should be immaterial that the improper repairs are done under a gratuitous undertaking, rather than for hire or for a benefit accruing to the actor as landlord, or even that they are done without any understanding with the tenant at all. It should extend

to all persons whom the landlord ought to contemplate as apt to be exposed to whatever risk a lack of care on his part would create, unless there is some limitation recognized by Tort law confining the liability within narrower bounds.

In a number, indeed, a majority, of jurisdictions the liability of a contractor who as such contracts to do construction or repair work upon another's property, or of a manufacturer making an article for sale, is restricted to the owner of the property with whom the contract is made or the person to whom the article is sold as the first step in its distribution.

But there is no intimation in any of the cases cited by the Massachusetts Supreme Judicial Court of any reason why this limitation should not include landlords, or why, if landlords are to be excluded, their liability should depend upon the work being done for the purpose of gaining an advantage as landlord.

Bergeron v. *Forest* leaves the Massachusetts law on this subject in such a confused and uncertain state as to require an examination of the cases preceding it.

II

Prior to 1870, the Massachusetts decisions as to the liability of a landlord for injuries caused by the defective condition of his premises while in the occupation of a tenant followed the generally accepted doctrines on the subject.

The landlord is under no duty to turn over to the tenant the premises in a condition fit for safe occupation and use. He is, therefore, not liable to a tenant or a person entering in the right of the tenant who while upon the premises is injured by a dangerous defect therein,[7] unless the landlord knew of the defect and

[7] Unless the premises are leased for immediate use in their existing condition, for a purpose which involves the lessee inviting the public thereto, Oxford *v.* Leathe, 165 Mass. 254, 43 N. E. 92 (1896). A "rink and seats" leased for four nights to one Gleason who owned a troupe of trained horses, under an arrangement by which the lessor was to retain control of the box office till his nightly rent was collected. "The short and interrupted character of the occupation allowed to Gleason made it obvious that the safety of the building must be left mainly to the defendant" per Holmes, J.

See *accord:* Camp *v.* Wood, 76 N. Y. 92 (1879); and Fox *v.* Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788 (1897). And see Barrett *v.* Lake Ontario Co., 174 N. Y. 310, 66 N. E. 968, (1903); Albert *v.* State, use of Ryan, 66 Md. 325, 7 Atl. 697 (1887); Joyce *v.* Martin, 15 R. I. 588, 10 Atl. 620 (1887); and Kane *v.* Lauer, 52 Pa. Sup. 467 (1913); in which the premises were let for a considerable term (in Kane *v.* Lauer, for

concealed it from the tenant or failed to disclose it to him, it being unlikely to be discovered by the tenant by any inspection which he was bound to make.[8]

Since the landlord is under no duty to repair defects existing prior to the lease, *a fortiori*, he is under no duty to repair dilapidations which occur during the tenancy even though called to his attention by the tenant.

A covenant to repair is held to create a purely contractual obligation, there being no pre-existing common law duty which it defines. And a separate agreement made upon sufficient consideration after the premises have been turned over to the tenant clearly should have no greater effect. Only the tenant can recover for the landlord's breach of such a covenant or agreement and the tenant's recovery is limited to the cost to which he is put in making the repairs which the landlord should have made and to the loss of the use of the premises, if the landlord's breach has made them unfit for use.[9]

A distinction is drawn between such covenants and covenants to make such repairs as are necessary to prevent the premises from becoming a nuisance in the strict sense of that term, that is, of falling into a condition likely to do harm to persons and property outside the boundaries of the premises. The landlord is liable under such covenants for any injury to persons or property sustained outside of the premises,[10] the person injured having his election to sue either the landlord or the tenant.[11]

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two years). The fact that the lease is for the specific purpose of throwing it open to the public is, in some of the cases, held to make its condition, rendering it dangerous to the public using it, "a nuisance," so as to make the landlord liable on the principle laid down in Rosewell *v.* Prior, 2 Salkeld, 460 (1701). It is hard to see any logical distinction between such cases and the lease of a shop or even a dwelling. The probability of injury and not the number of persons imperilled should control. There is much force in what Wilkes, J., says in Willcox *v.* Hines, 100 Tenn. 538, 558, 46 S. W. 297 (1898): "The obligation not to expose the individual to danger is the same as not to expose the public to danger."

[8] Minor *v.* Sharon, 112 Mass. 477 (1873); Cowen *v.* Sunderland, 145 Mass. 363, 14 N. E. 117 (1887).

[9] Tuttle *v.* Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465 (1887).

[10] City of Lowell *v.* Spaulding, 58 Mass. (4 Cush.) 277 (1849), in which Shaw, C. J.,

[11] The marginal note to Payne *v.* Rogers, 2 H. Bl. 350 (1794), is as follows: "If an *owner* of a house is bound to repair it, he, *and not the occupier*, is liable . . . for an injury sustained by want of repair," and 18 HALSBURY, LAWS OF ENGLAND, 504, cites

In 1870 it was held in *Gill* v. *Middleton* [12] that a landlord was liable for injuries which the wife of his tenant received through the

says that this is "to avoid circuity of action," citing Payne *v.* Rogers, 2 H. Bl. 349 (1794).

It is very doubtful whether this is the true reason or indeed a tenable reason for holding a landlord liable because of his covenant to repair the exterior of leased premises. It implies that such a covenant binds the landlord to indemnify the tenant for any damages which he may have to pay to a stranger because of the bad repair of the premises which he occupies. It does not explain why such a covenant should have such an effect, while a covenant to repair the interior of the premises is construed to bind

Payne *v.* Rogers as authority for its statement that the liability is shifted to the landlord. On the other hand, Lord Denman says in Russell *v.* Shenton, 3 A. & E. (N. S.) 449, 459 (1842), "that the language of the Court" (in Payne *v.* Rogers) "is not very clear; but, if the marginal note may be taken to be a fair representation of the effect of the decision, it will be hard to reconcile with Cheetham *v.* Hampson, 4 T. R. 318 (1791)." It is submitted that the language of none of the judges, taken in connection with the actual question before them, required so broad a statement. Buller, J., says, 2 H. Bl. 351: "I agree that the tenant as occupier is *prima facie* liable to the public, whatever private agreement there may be between him and the landlord. But if he can show that the landlord is to repair, then the landlord is liable." The action was against the landlord and not the tenant, and it is giving too much weight to the words "*prima facie*" to hold that Justice Buller meant thereby that the tenant was liable only until he could transfer his liability to the landlord by showing that the latter had covenanted to repair, without regard to the fact that he expressly states that this "*prima facie*" liability exists "whatever the private agreement may be between him and his landlord." And Justice Heath's reason, that "if we hold the tenant liable, then we encourage circuity of action, as the tenant would have his remedy over against the landlord," while it may be a good or a bad reason for holding the landlord directly liable, would be at least as valid if he had said "if we hold the tenant *solely* liable," which after all was the only way in which the liability of the tenant was involved in the question before him. At all events American courts, while accepting Payne *v.* Rogers as authority for what it actually decided, have not followed the marginal note. Chief Justice Shaw says, in Lowell *v.* Spaulding, 4 Cush. (Mass.) 277, 279 (1849): "By common law, the occupier and not the landlord is bound, as between himself and the public, so far to keep the buildings in repair that they may be safe for the public. If, indeed, there is an express agreement between landlord and tenant, that the former shall keep the premises in repair, . . . the party injured by the defect and want of repair, may have his action *in the first instance*, against the landlord," that is, may sue him directly and need not sue the tenant primarily liable, leaving him to recover over from the landlord on their agreement; and see to the same effect Scholfield, J., in Gridley *v.* Bloomington, 68 Ill. 47 (1873). Rogers, J., in Bears *v.* Ambler, 9 Pa. 193 (1848) is even more explicit. He says, "a tenant or occupier is always liable for an injury caused by his neglect, irrespective of any contract between him and the landlord" (note the similarity to Justice Buller's statement in Payne *v.* Rogers); "the tenant always is, the landlord may be, liable for an injury sustained by a third party."

[12] 105 Mass. 477, 478, 479 (1870).

collapse of the floor of an outbuilding which a landlord had undertaken to repair and which after negligently making some repairs, he had assured her he had made safe for her to use.

The Court, speaking through Justice Ames, said:

"In the ordinary contract between landlord and tenant, there is no implied warranty on the part of the former that the demised premises

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the landlord no further than to reimburse the tenant for the cost, to which he is put in making for himself those repairs which the landlord, in breach of his covenant, has failed to make.

Nor is there any general principle of law against circuity of action which universally permits a direct recovery, whenever the person responsible at common law for an injury to another has a right to indemnity from some third person. Suppose that a vendor warrants tools or machinery as fit for a particular use, for which they are in fact unfit, and the purchaser, relying on the warranty, supplies them to his servant without inspecting them and so makes himself liable for an injury caused thereby. The vendor is liable to indemnify the purchaser for the damages which his servant recovers. But no one has ever suggested that to avoid circuity of action the servant might recover directly against the warranting vendor, still less that his only right of action is against the warrantor, as the marginal note to Payne *v.* Rogers states the effect of the landlord's covenant to be.

A better reason would seem to be that given by McIlvaine, J., in Cheadle *v.* Burdick, 26 Ohio St. 393, at p. 396 (1875), that the landlord, "having thus reserved the control [of the premises] to the extent necessary for making repairs, his duty to the public in relation to the property is not affected by the lease," and by Collins, M. R., in Cavalier *v.* Pope, L. R. [1905] 2 K. B. 757, 762, and May *v.* Ennis, 78 App. Div. 552, 79 N. Y. Supp. 896 (1903).

This would make the obligation sound in tort and thus prevent the anomaly of a contract creating an obligation toward those not party to it. And it would explain the difference in effect given to a covenant to make repairs necessary for the safety of the public and a covenant to make such repairs as are necessary only for the safety of those who enter the premises in the course of the occupier's use of them.

Those who enter the premises must look to him, who permits his entry, to make them safe or to disclose any defect which renders them unsafe for his use, and the law does not require the owner to contemplate the probability, however great it may actually be, that the tenant will use or permit others to use property which he knows the owner has, in breach of his covenant, failed to repair. Mere power to enter and perform his contract is therefore not enough to cast on him any duty to make the premises safe for use. But the owner has, as such, a duty to maintain his property in such a condition that it shall not be dangerous to the public, whether as travelers on a highway upon which it abuts, or as owners of adjacent property, or as persons upon such property in the owner's right quite independent of his or the occupier's consent. His duty may be suspended, when in a legally permissible way, as by leasing the premises, he parts with his right to enter it and so loses his power to perform his duty to maintain it in safe condition; but when by a covenant to repair he retains the right of entry and the power for performance, the reason for the suspension of his duty fails. This is similar to the difference in the liability which a landlord incurs to the public and those injured while within premises which he leases in a patently ruinous condition, both external and internal.

are in tenantable condition. He is under no obligation to make repairs, unless such a stipulation makes a part of the original contract: and any promise to do so, founded merely on the relation of the parties, and not one of the conditions of the lease, would be without consideration, and for that reason would create no liability. But although a gratuitous executory contract of that kind would not be binding upon him, he would place himself in a very different position if he should see fit to treat it as binding, and actually enter upon its fulfilment. He is at liberty to repudiate or to perform it, at his option; but if his choice should be to perform it, he comes under some degree of liability as to the manner of its performance.[13] It is well settled, that, for an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, although there was no consideration for the promise.[14]

In this case, the landlord was told that the building was in an unsafe condition; and what he undertook to do, at the request of his tenant,[15]

[13] At first glance the opinion might be taken to indicate that the right to refuse to carry out a gratuitous promise is lost by embarking on its performance, or at the least that care must be exercised so that even a partial performance may be well done as far as it goes.

But this part of the opinion must be taken in connection with the emphasis later put on the defendant's assurance that the premises had been made safe. The gist of the defendant's wrong is the misleading quality of his conduct and words. Clearly he might, after starting to repair, have changed his mind and abandoned the work so long as he had done nothing to mislead the tenant into believing that he had completed it. The tenant had no right to demand that he should carry out his gratuitous undertaking, and he had certainly no right to complain that he had been given half a loaf rather than no bread. He would not have been harmed but benefited by so much as the landlord had chosen to do, though less than what he had promised. So, too, if the landlord had told the tenant exactly what he had done and what material he had used and the tenant had chosen to consider that they had made the outbuilding safe, any injury he sustained by using it would have been ascribed to his own bad judgment, for he certainly is not entitled to demand better judgment from his landlord than he exercises for his own protection. See Marston *v.* Frisbie, 168 App. Div. 666, 154 N. Y. Supp. 367 (1915); Rhoades *v.* Seidel, 139 Mich. 608, 102 N. W. 1025 (1905); and Sheridan *v.* Krupp, 141 Pa. 564, 21 Atl. 670 (1891).

The landlord was held bound to take care to do the work well because he had taken over the control of this work, involving as it did the safety of the tenant and of those who might use the premises in his right, into his own exclusive charge and custody with full knowledge that the tenant must rely on his care and skill for his own protection and that of his invitees and licensees.

[14] Citing Benden *v.* Manning, 2 N. H. 289 (1820); Thorne *v.* Deas, 4 Johns. (N. Y.) 84 (1809); Elsee *v.* Gatward, 5 T. R. 143 (1793); Shiells *v.* Blackburne, 1 H. Bl. 158 (1789); Balfe *v.* West, 22 Eng. Law & Eq. 506 (1853).

[15] The report states that at the trial these facts (*inter alia*) appeared: "The out-

was to make it safe. He not only assumed to do the work, but he notified the tenant when it was done, and invited him to make use of the building, assuring him that it was perfectly safe. Under these circumstances, it was correctly ruled by the presiding judge, that if on trial it proved to be unsafe, by reason of the want of ordinary care and skill on the part of the defendant in the workmanship or in the selection of the materials used,[16] he might be held responsible in damages."

The opinion of Justice Ames is in some respects rather vague and it is difficult to reconcile the facts as stated by him with those appearing at the trial. But it is clear that it put the defendant's

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building" was out of repair and the plaintiffs (the action was brought by the tenant and his wife for injuries to the latter, her husband being joined for conformity) "requested the landlord to put it in repair. He said he would do so. After finishing them" (the repairs) "he told Mrs. Gill" (the wife of the tenant) "that he had made it safe so she need not fear to use it."

[16] The defendant had testified at the trial that he had made such repairs as he thought needful to render the outbuilding safe. The trial judge refused to instruct the jury as requested by the defendant, (1) that he was not liable if he had made such repairs as he thought sufficient to make the premises safe and (2) that he was not liable unless he knew or believed that the repairs which he made were insufficient and that the premises were still unsafe and dangerous. The judge instructed the jury that the defendant was liable for want of ordinary care and skill in workmanship or selection of materials. The Supreme Judicial Court held this instruction proper, rejecting the argument that "the defendant could only be held responsible for bad faith or gross negligence." Anything approaching a full discussion of the existence of "gross negligence" as distinct from "ordinary negligence" and the precise standard of proper performance of a gratuitous undertaking, whether to make repairs, to perform other services or to keep as bailee the chattels of a bailor, would require a separate article. The first question in its essence appears to be one of terminology, since the same result is reached by holding that in one situation a man is liable for ordinary negligence and in another is liable only if guilty of gross negligence and by holding that a man is in all situations bound to use a degree of care varying with the circumstances. But where, as in Massachusetts, the legislature has used the term "gross negligence" in its statutes, it may be necessary to treat it as distinct from ordinary negligence. It is enough to say that until 1917 the landlord gratuitously making repairs was held responsible for ordinary care and in Buldra *v.* Henin, 212 Mass. 275, 98 N. E. 863 (1912) the landlord was held answerable for the merely operative negligence of an independent contractor, — a gas fitter, — sent to cap pipes on which fixtures had not yet been installed.

But in West *v.* Poor, 196 Mass. 183, 81 N. E. 960 (1907), it was held that the liability of a man who invites another to ride *gratis* in his carriage is no greater than that of a gratuitous bailee, who in Massachusetts is held to be liable only for gross negligence, and in Massaletti *v.* Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917) in an opinion in which the whole question of gross negligence is discussed at great length, the court, regarding all gratuitous undertakings as governed by the same principle as gratuitous bailments, expressed its disapproval of that part of Gill *v.* Middleton which held the landlord liable for "ordinary negligence" in making gratuitous repairs.

liability upon general principles assumed to apply to the misfeasance of any gratuitous undertaking and not upon any peculiar and exceptional obligation which a landlord assumes by attempting to perform a gratuitous undertaking to make repairs for a tenant.

It is equally clear that it emphasizes the fact that the person injured was misled into using the outbuilding both by the fact that the landlord had gone through the form of making repairs and by his express assurance that it was perfectly safe.

There is nothing to indicate that he, and still less that the trial judge whose instruction he approved, regarded the undertaking as made with the female plaintiff or that either of them regarded this matter, or the fact that the promise, if made only to the tenant, was given in her presence as controlling, and from the fact that the assurance, which was actually given to the tenant's wife, was said to have been given to the tenant, it would seem that the tenant's family was considered substantially identified with the tenant in so far as their occupation of the demised premises was concerned.

In none of the many cases which cited, followed or distinguished *Gill* v. *Middleton* during the forty-five years between 1870 and 1915, was there any intimation that the liability of a landlord gratuitously making repairs was restricted to the tenant or to those persons of his family who were present when the promise was made and to that extent co-promisees.

In *Riley* v. *Lissner*[17] Justice Holmes cites *Gill* v. *Middleton* as authority, for permitting the wife of the tenant to recover, though

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[17] 160 Mass. 330, 35 N. E. 1130 (1894). The landlord's negligence consisted in a failure properly to replace the cover of a cesspool, which he had gratuitously cleaned, and so to restore the premises to their previously safe condition. Thus it created a new defect and did not merely fail to remove an old one. But this was properly assumed to be immaterial. In the very recent case of Harvey *v.* Crane, 131 N. E. 168 (Mass., 1921) the court treats a very similar case as one of negligence in performing a gratuitous undertaking and in order to hold the defendant landlord liable to his tenant finds him guilty of gross negligence in failing to close a trap-door, into which the plaintiff fell, while returning home at night and entering the room without striking a light.

The language of the court in describing this operative forgetfulness, which threatened no harm except under the rather unusual circumstance which actually occurred, lends point to Baron Rolfe's statement that "it" (gross negligence) "is the same thing" (as negligence) "with the addition of a vituperative epithet," Wilson *v.* Brett, 11 M. & W. 113, 115 (1843).

there is not a fact reported which gives the slightest indication that she was present when the landlord undertook to clean the cesspool whose badly replaced lid caused her injury, or that she had received any direct assurance from him or his workmen that the premises had been restored to their original safe condition; or indeed that she had received any assurance that the work had been well done other than that which might be implied from the fact that the workmen had left the job as finished.

In *Shute* v. *Bills*,[18] the person injured was the daughter of the tenant. There was nothing to indicate that she had been present when the landlord undertook the repairs whose improper performance caused her injury or that she had received any express assurance from the landlord or his workmen that the premises had been made safe for her to use; yet the court held that the trial judge had erred in directing a verdict for the defendant because there was evidence from which the jury might have found that the injury was due to the negligent manner in which the repairs were made. There was, it is true, some evidence that at the time when the tenant was negotiating the lease, the landlord's agent had promised to make any repairs that were needed in reason. Though this fact is stated in the opinion, the court places no emphasis on it nor does it place the daughter's right to recover on the ground that the work was done in performance of an undertaking made as inducement to the tenant to sign the lease.

This restriction of liability appears first in *Thomas* v. *Lane*,[19] in which it was held that if "a landlord gratuitously or for hire undertakes to make repairs upon demised premises he is under no greater liability in case the repairs are negligently made than a third person [20] would have been if a third person had undertaken

[18] 191 Mass. 433, 78 N. E. 96 (1906). In Galvin *v.* Beals, 187 Mass. 250, 72 N. E. 969 (1905), the facts were held not to bring the case within Gill *v.* Middleton because there was no evidence to show "that the (landlord's) alleged agent undertook to do anything about the railing (whose fall caused the plaintiff's injury) or that he did anything about it. The plaintiff complained of certain defects, and these he remedied." The case holds that the mere fact that the landlord did repair work on a particular part of the premises is not sufficient to justify the tenant in assuming that he had discovered and remedied defects of which she had not complained and which he had therefore never undertaken to repair.

[19] 221 Mass. 447, 450, 109 N. E. 363 (1915).

[20] 221 Mass. 447, 450, 109 N. E. 363 (1915). "Upon the question whether a third party under these circumstances is liable to any one but the other party to the con-

to make the same repairs either gratuitously or for hire and had done them negligently," and therefore the defendant was not liable to a social guest of the tenant injured by the giving way of a railing on the front steps of the demised premises which the defendant had, on the complaint of the tenant's wife, gratuitously and negligently repaired.

So far from recognizing any difference in the extent of the respective liability of persons undertaking repairs, gratuitously or for hire, as landlord or in any other capacity, the court restricts the defendant's liability to his tenant, not because he had undertaken the repairs as a favor to his tenant rather than to induce him not to throw over his lease, not because he was a landlord rather than a contractor who for hire, or as a favor to a friend, had made similar repairs, but because the liability for the imperfect performance of any undertaking is restricted to those party to it.[21] And it is significant that all the cases cited in support of

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tract, Winterbottom *v.* Wright, 10 M. & W. 109, is the leading case" and "has been cited with approval in Albro *v.* Jaquith, 4 Gray 99, 102, Davidson *v.* Nichols, 11 Allen 514, 520, Osborne *v.* Morgan, 130 Mass. 102, 104, and is the law of the Commonwealth. See Lebourdais *v.* Vitrified Wheel Co., 194 Mass. 341." Many cases from other jurisdictions are cited in a footnote but in all but one, Curtin *v.* Somerset, 140 Pa. 70, 21 Atl. 244 (1891), in which the defendant was a contractor for the construction of a hotel, the defendant was a manufacturer the use of whose negligently made product had injured some one other than his immediate vendee.

[21] Loring, J., held, 221 Mass. 447, 451 (1915), that Gill *v.* Middleton "must be taken to be an authority depending upon the special circumstances of that case." He quotes its facts as stated in the report, *inter alia*, that "the plaintiffs requested the defendant to put it in repair. He said he would do so." And he then says: "It appears, therefore, that in that case the undertaking of the landlord to put the privy in repair was an undertaking not with the tenant alone but an undertaking with the tenant and his wife; and further that the defendant landlord recognized that his undertaking was an undertaking with the wife as well as with the tenant by giving her the assurance ('after finishing them') that he had made it safe, so that she need not fear to use it."

Apparently he regards the landlord's obligation to exercise care in making such repairs as he chose to make as arising out of the promise and so, in analogy to contractual obligations, confined to those to whom the promisor understands that he is giving the promise. It is submitted that the obligation does not arise out of the promise but out of the misfeasance in the attempt to perform it. See as to this p. 651, *infra*. .. It would attach if the work was done without any definite antecedent promise, as in Gregor *v.* Cady, 82 Me. 131, 19 Atl. 108 (1889), or even if the landlord had planned it as an agreeable surprise to an absent tenant, who had not known of it till the work was completed.

It is curious that the same Justice, who had only a short time before gone out of his way in Miles *v.* Janvrin, 196 Mass. 431, 82 N. E. 708 (1907), see note 25, *infra*, to

this general principle are cases where the undertaking was for hire or where goods had been manufactured and sold. Not one is a case of services gratuitously undertaken or of chattels gratuitously given or lent.

Yet within four months the same court, speaking through the same justice, held in *Feeley* v. *Doyle*,[22] that a landlord who had let an ice-cream parlor was liable to a customer of his tenant who, while sitting at a table therein, was injured by the collapse of a pillar, which, as part of alterations desired by the tenant, had been substituted for an unsightly chimney.

It was held that the case did not come within *Thomas* v. *Lane* because that case was one where repairs had been made gratuitously by a landlord upon the tenant's request while in the pending case the repairs were made [23] under an arrangement by which the

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find a very doubtful theory by which to extend an obviously contractual obligation so as to give a remedy for its breach to those not party to it, should have regarded a purely tort obligation as based on an unenforceable agreement, and so restricted its obligation as though it were a true contract.

But apart from this, the determination of the persons to whom the defendant intended to bind himself or to whom he understood that he was bound must often be left to conjecture or vague inferences, such as that which Loring, J. draws from the fact that the landlord assured the plaintiff that the privy had been made safe, an assurance which he might as well have given to any person likely to use the privy whom he had met as he was leaving the premises "after finishing" the repairs. There is no such sure and certain test available, as in contracts founded on consideration, which only he who furnishes the consideration, can enforce or rely upon.

[22] 222 Mass. 155, 157, 109 N. E. 902 (1915).

[23] The facts are not stated with absolute fullness. It is said that "the defendant's agent had the work done." Whether this means that the agent employed workmen to do the work under his own direction or that, as agent, his business was so large that he maintained a staff competent to undertake these rather elaborate alterations, or on the other hand, that he employed an independent contractor to do the work, is left to conjecture. But the inherent probabilities seem almost conclusive in favor of the latter supposition, as the normal and usual way in which such alterations are made by any but the most exceptional of agents.

If this is so, the defendant's liability like that of the landlord in Bulger *v.* Henin, *supra*, n. 16, who gratuitously undertook to have gas pipes capped, goes far beyond the normal concept of ordinary negligence, which standing by itself implies personal neglect or the neglect of some servant or other person, for whose conduct there is a general vicarious liability placed by law upon the defendant.

There being no statement that the work was done by an independent contractor, there is, of course, nothing to intimate that the agent was negligent in employing an incompetent contractor or in failing to discover the dangerous condition of the pillar before accepting the work as completed to his satisfaction. The court, therefore,

rent would not be raised, as the landlord had threatened, if the tenant would bear the cost of the alterations which he required to make the parlor more attractive. This was held to warrant the jury in finding that the repairs were made by the defendant and were made by her in order to induce the tenant to continue his tenancy.[24] The court, therefore, held the case to be one "where during the tenancy a change is made in the demised premises by a landlord as one of the terms by which the lease is to be continued in effect. Under these circumstances, the right of recovery is not limited to the tenant but includes all persons who within the contemplation of the landlord and the tenant were to use the premises under the lease. In the case of an 'ice-cream parlor,' that includes persons who enter the premises to buy ice-cream." [25]

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seems to impose upon the landlord the exceptional obligation to answer for the operative negligence of an independent contractor.

[24] The distinction seems a fine one between alterations made to induce a tenant to continue his tenancy and repairs undertaken to keep a good tenant satisfied. Indeed, from what one knows of human nature, it may be suspected that repairs are rarely made by landlords without some motive of self-interest. It is obvious that, to preserve his property from falling into ruin, even the most hardhearted landlord of premises rented to a poor tenant may agree to make and pay for repairs, which by the terms of the lease the tenant ought to make. But it is not strange that this distinction should be drawn. It is similar to the distinction drawn between services rendered under promise of a legacy and services rendered in the hope of obtaining one by ingratiating oneself with a well-to-do friend or relative.

[25] The court then says: "In other words, the case is governed by Domenicis *v.* Fleisher, 195 Mass. 281, not by Thomas *v.* Lane." By this, the court must mean that the landlord's liability is as extensive as in that of Domenicis *v.* Fleisher. That case had nothing whatever to do with the misrepair of the interior of the demised premises but was a case in which a landlord had failed to maintain in safe condition a stairway which was the common approach for a number of separate tenants, — the right to use the common stairway being as it were, appurtenant to the lease of each tenant, but the control and possession of the stairway being retained by the landlord and not included in the lease of any of the tenants.

There appears in Miles *v.* Janvrin, *supra*, n. 21, the same curious tendency to justify any extension of a landlord's liability under an agreement with his tenant so as to include the personal injuries caused by its breach not only to him but to all others coming upon the premises in his right, by torturing the landlord's position into some fanciful analogy to that dealt with in Domenicis *v.* Fleisher. Loring, J., held that while the breach of "an agreement to make specific repairs" or even "an agreement to keep the premises in repair generally during the term of the lease" does not make the landlord liable for personal injuries caused even to the tenant by its breach, yet if the landlord agreed "to maintain the premises in a safe condition for his (the tenant's) use," "the premises to be kept in repair are to remain in the control of the landlord, ... with nothing but a right in the tenant to use them." The result being, "that, so far

At first glance it might appear that the court is distinguishing the case from *Thomas* v. *Lane* upon the ground that the work undertaken was alteration rather than repair, and that its misperformance created a new danger and did not merely prevent the removal of a pre-existing one. Whether there be or be not any valid distinction between a new defect and a failure to remove a pre-existing one, the court's use of the words "repairs" and "change" as apparently interchangeable terms, indicates that it did not intend to distinguish the case from *Thomas* v. *Lane* upon this ground but solely upon the ground that the rule in *Thomas* v. *Lane* was applicable only to cases where the landlord had done work upon the demised premises gratuitously.[26]

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as their safety is concerned, the landlord's relation to the premises to be kept in repair is the same as that of a landlord in case of common passageways in a tenement house" as to which, he says, see Domenicis *v.* Fleisher; "the only difference being that in a case like the case at bar the tenant has an exclusive use, while in case of common passageways in a tenement house the use which the several tenants have is not exclusive." But this difference does not seem so immaterial to Lord Atkinson, who, in Cavalier *v.* Pope, L. R. [1906] A. C. 428, cited by Loring, J., says, at p. 433: "In Miller *v.* Hancock, L. R. [1893], 2 Q. B. 177" (the leading English case similar to Domenicis *v.* Fleisher) "the landlord was held liable because control was retained by him; but the power of control necessary to raise the duty ... " (to maintain common passageways, &c. in good repair) "implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them."

Nor does Justice Loring even suggest any reason why the agreement to make the premises safe for use should, while the agreement to repair generally should not, so transfer this control to the landlord, as to relieve the tenant of any duty to provide for the "safety" of those "claiming in his right."

The part of the premises which the landlord was to repair was the outer stairway, any need for repair to which was practically as easy for the landlord to discover as for the tenant and it is possible that Justice Loring had in mind that in such case it might be proper to permit the tenant to entrust the whole matter of its condition to the exclusive charge of the landlord, but, if it is proper for a tenant to trust not only his own safety but that of his family and guests to his landlord's agreement to repair, it is difficult to see why a tenant may not equally trust the safety of his family and guests to the care and skill of a landlord who, however gratuitously, has actually repaired his premises. And if the landlord by accepting this confidence puts himself under a legal duty to all those whose safety is thus entrusted to him, it is difficult to see why the confidence which the tenant reposes in the propriety of repairs made by a landlord does not put him under an equal obligation to those whose safety as obviously depends on his care in making them.

[26] If there is any importance in this difference, it lies in the fact that the misperformance of the undertaking created a new danger which did not previously exist, while in the case of the imperfect performance of repairs, there is no new danger created except in so far as reliance upon the fact that the landlord has gone through the form of

III

It seems clear that the court in *Gill* v. *Middleton* applied the principle, which it deduced from the cases it cited, to an injury materially differing, both in nature and in the manner in which it was brought about, from the injuries for which recovery was allowed in any of those cases.

In all of them the plaintiff complained of a direct injury to his proprietary or pecuniary interests. The defendant's carelessness, unskilfulness, or disregard of the terms of his undertaking spoiled or destroyed personal property which the plaintiff had entrusted to him or put the plaintiff to an unexpected and unauthorized expense.[27]

In *Gill* v. *Middleton* the plaintiff was permitted to recover for injury to her person, indirectly resulting from the defendant's negligence. The physical condition of the premises was not changed for the worse, no new defect was created. Even the tenant could not have maintained an action for injury to his leasehold interest in the

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making the repairs misleads the tenant into using the premises which he had before refrained from using because of its danger, or in using it without those precautions which had previously enabled him to escape injury.

The case has one factor in common with Thomas *v.* Lane. There is nothing to indicate that any direct assurance had been given by the landlord to the person injured that the work had been properly done so as to make it safe for him to accept the tenant's invitation to use the premises whether as business invitee or social guest, or even to suggest that the customer or the tenant's friend had known that any work had been done by the landlord; therefore there was no room to find that they had been personally misled by whatever assurance of safety might be implied from the fact that the landlord had left the job as finished. In both the plaintiff is injured not by his own reliance upon the landlord's exercise of care in carrying out his undertaking but by the tenant's reliance upon the landlord's performance as sufficient to justify him in holding out the premises as a safe place to which to invite his customers or friends.

[27] In Benden *v.* Manning, the defendant, a tailor, had ruined cloth which the plaintiff had given him to make up into a coat; in Shiells *v.* Blackburne, the defendant had volunteered to enter the plaintiff's goods at the custom house for exportation and entered them wrongly so that they were seized; in Wilson *v.* Brett, 11 M. & W. 113 (1843) not cited, the defendant who gratuitously rode the defendant's horse to show him to a prospective purchaser, rode him so carelessly and unskilfully as to let him down and injure him; in Elsee *v.* Gatward, the defendant by using new material instead of old as he had agreed, greatly increased the expense of the work which he had undertaken, while in Thorne *v.* Deas and Balfe *v.* West, recovery was denied because the defendant had not embarked on the performance of his gratuitous undertaking.

property. The plaintiff's injury was caused by using the imperfectly repaired outbuilding in reliance upon the defendant's assurance of safety, implied from his having made the repairs and left the job as finished and upon his express statement that it was perfectly safe.

But it is submitted that this extension of the liability for misfeasance of a gratuitous undertaking to such an injury was sound and proper.

The liability for negligence in performing a gratuitous undertaking is not contractual or even consensual but is essentially a Tort liability. The duty to use care, if indeed the duty recognized in *Gill* v. *Middleton* can be properly so stated, in performing a gratuitous undertaking of this sort does not arise out of the promise. It could do so only as an artificially implied term of the undertaking[28] and it would surely be an extraordinary anomaly to hold that a gratuitous promise creates no obligation to perform it, that the promisor may perform it or not as he pleases and that the promisee has no right to demand its performance or to rely upon its being performed, and yet to hold that a term artificially implied therein does create a legally binding obligation which the promisor must perform to escape liability and upon the proper performance of which the promisee is legally entitled to rely.

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[28] Indeed, strictly speaking, Gill *v.* Middleton does not recognize a duty to use care in the performance of a gratuitous undertaking of this or any other sort. If it did so, it would follow that having once embarked upon the performance the promisor would be liable if the repairs were imperfectly made. The facts do not require so broad a duty to support them. It is confidently submitted that no matter how badly the landlord had made the repairs, if their insufficiency was known to the tenant, he could not recover because the landlord's carelessness or unskilfulness had prevented him from removing a defect which harmed him only in that it interfered with his full use of the premises. In such case, the gist of this complaint would be that the landlord's negligence had prevented him from obtaining the full benefit which his landlord's promise and his attempt to perform it had led him to expect that he would receive. His position would not be legally changed for the worse. The important thing, therefore, was not the mere breach of a duty to take care, but the misleading quality of the landlord's conduct in apparently making the repairs.

An exact statement of the "duty" would be somewhat as follows: It is the duty of one choosing to perform a gratuitous undertaking to take care lest he should mislead his promisee into the belief that the work has been well done and the premises made safe for use. While it may not require a very great stretch of the imagination to imply a term in a voluntary undertaking that if it be done at all it shall be well done, yet it is certainly going very far to imply a term that the landlord will take such care in making the repairs as is necessary to prevent the tenant from being misled into using it in the belief that the repairs have been properly made.

The liability for misfeasance [29] in the performance of work done for another was recognized before the action of assumpsit had been devised to give binding force to executory contracts not under seal.[30] It is based upon one of the most fundamental principles of Tort law. No man is bound to aid or benefit another, in the absence of some peculiar relationship or an express agreement given upon a sufficient consideration. Therefore mere inaction cannot create liability, but liability for the consequence of action is a very different matter. If a man chooses to act, he must so act as not to create an undue risk of injury to others. If he consciously interjects himself into the affairs of others, he must take care that his interference shall not unduly endanger them, and while he is not bound to protect or benefit his neighbor, he must not so act as to change his position for the worse. The person voluntarily and gratuitously making repairs upon another's premises, whether as landlord or in any other capacity, whether the premises are occupied by his tenant or by an owner, is therefore bound to take reasonable care therein, so that his act may not endanger those whom he should expect to use the premises, and if he creates a danger and that danger results in injury, he is liable therefor.

While in *Gill* v. *Middleton* the landlord's carelessness in making the repairs did not change the physical condition of the premises for the worse and therefore did not injure the proprietary interests of the tenant as holder of the lease, it does not follow that it did not change the position of the tenant, and those using the premises in his right, for the worse.

Even were the physical condition of the premises substantially better than before, the landlord by going through the form of making repairs, which have been entrusted to his exclusive charge and control, has changed the defective condition of the premises, which, while known to exist, was a mere impediment to their full

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[29] The very term "misfeasance" so commonly used both in the cases cited in Gill *v.* Middleton and in the majority of those which deal with gratuitous undertakings, including undertakings to repair, is a strong indication that such negligent misperformance is a tort.

Even where a "misfeasance" occurs in the course of the performance of a binding contract the liability sounds essentially in tort if the harm resulting is something other than the failure of the promisee to obtain the benefit bargained for.

[30] Y. B. 22 Ass. pl. 41 (1347), Y. B. 11 H. IV, 33, pl. 60 (1409), Y. B. 3 H. VI, 36 pl. 33 (1424), Y. B. 20 H. VI, 34 pl. 4 (1441).

use and enjoyment, into a serious danger to all who might rightfully use them.[31]

But a defect in the interior of premises is not actively harmful but requires some act of the user to make its injurious potentialities effective. And the primary duty of seeing to it that property, real or personal, is fit for a particular use rests on him, who puts it to that use. And the tendency to hold that there is no duty to render it impossible for another to harm himself or others by his positive misconduct is particularly marked where one turns over his property to another for use. Therefore the crux of the landlord's liability is the issue whether the tenant in using, or permitting others to use, the premises as safe, is, as between himself and his landlord, guilty of a wrongful misuse of the property, the risk of which he and he alone should bear. And this depends upon whether the tenant not only does rely, but is legally entitled to rely on his trust in the landlord's skill and care as a sufficient assurance that he has made whatever repairs he has chosen to make, with sufficient competence to warrant the tenant, without more, in using the premises as safe.[32]

There is no question that tenants do in fact so regard the making of repairs, and that landlords do realize this and therefore realize that the safety of the tenant, and those whose use of the premises in his right is involved in his tenancy, does in fact depend on his making the repairs at least as well as they appear to have been made. But there still remains the question whether the tenant is

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[31] It is necessary to bear in mind the distinction between active and passive dangers. The first include all those acts or conditions which of themselves set in motion injurious consequences which require no assistance to work harm. Knowledge of their existence at most may enable those threatened by them to escape, by positive action taken to remove themselves from their reach. The latter include conditions which require some active dealing with them to make them harmful. The reckless driving of an automobile through city streets creates of itself a danger, a risk to the public entitled to travel upon them. An automobile, no matter how defective the steering gear may be, is harmless until some one drives it. So a ruinous stairway or floor in leased premises can do harm only to those who use it. Until used it is as harmless as though in perfect condition. Danger or risk in such an inactive condition is a compound of two factors, each as essential as the other, the defect and the use of the premises; and the user's ignorance of its existence becomes an essential factor in determining whether he who is responsible for the defect is bound to foresee the use, and so to realize that he has created a danger or risk.

[32] As to this, see Holmes, J., in Riley *v.* Lissner, 160 Mass. 330, 35 N. E. 1130 (1894), *supra*, n. 17.

legally entitled so to rely on his landlord — whether the landlord is legally bound to foresee that the premises will be used as safe in reliance on his competence.

It seems clear that the tenant has no right to rely on the repairs being properly made unless they have been entrusted to the landlord's exclusive charge and control. If the tenant is present while the work is being done and so knows how it is done or if the landlord tells him exactly what he has done, the tenant has no right to trust blindly to the landlord's judgment [33] — except perhaps where the work is such that it requires special training and experience adequately to determine its sufficiency.[34] So too if the imperfection of the repairs is obvious to the mere use of the senses, — if, as one might say, it leaps to the eye. On the other hand, where the repairs are of such a character that a structure must be torn up to ascertain whether they are properly done, the tenant must trust, and the landlord must realize that he must trust, exclusively to the care and skill of his benefactor. The tenant cannot be expected to make the premises unusable to see if they are fit for use. Nor can he be required to give up his ordinary affairs so as to stay continuously on the spot to supervise the job.

But when the actual character of the repairs could be ascertained by such an inspection as a tenant should make before leasing or an occupier is required to make before throwing his premises open to business invitees, the danger can hardly be said to be "latent," as that term is used in dealing with the duty of a vendor, lessor or donor of property, in those cases which hold such persons liable for a failure to disclose "latent" dangers known to them.

Yet in no case is recovery denied because the true character of the repairs could have been discovered by such an inspection. Not only throughout such cases but throughout all the cases, where one person, however gratuitously, assumes full charge of the property, person or interests of another, the trust reposed is held to be sufficient to justify an expectation that it will not be abused and that a service however gratuitously done will be done with reason-

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[33] Marston *v.* Frisbie, 168 App. Div. 666, 154 N. Y. Supp. 367 (1915); Rhoades *v.* Seidel, 139 Mich. 608, 102 N. W. 1025 (1905); Brown *v.* Keay, 9 Sc. L. T. R., 442 (1902); and see also Sheridan *v.* Krupp, 141 Pa. 564, 21 Atl. 670 (1891); and Callahan *v.* Loughran, 102 Cal. 476, 36 Pac. 835 (1894), *infra*, n. 54.

[34] See Devlin *v.* Smith, 89 N. Y. 470 (1882).

able care and skill.[35] Nor can the landlord say "while as a man I knew that my tenants would rely on my having made the repairs carefully, yet since I was not legally bound to make them at all, he has no legal right to expect anything of me." The tenant does not rely upon the landlord because he has promised to make the repairs; he relies on him as a man, and as such bound to exercise reasonable care and skill in performing an act, obligatory or voluntary, upon which he knows that the safety of others depends.

It may be suggested that this factor of trust reposed and accepted is sufficient to distinguish such cases from those in which the parties deal at arm's length, as do vendor and vendee and lessor and lessee, where the duty of full disclosure is imposed only when the power of self protection is substantially absent. And it is noteworthy that in those relations which contain any tincture of confidence, such as that between an occupier of land and his invitees and licensees, the occupier is generally held bound to disclose defects if they are not obvious to the senses of his guest.

The liability for the negligent performance of a gratuitous undertaking, such as that of a landlord making repairs upon his premises let to a tenant, being a Tort liability, its existence and extent should be determined by general principles of Tort law. Therefore, it should extend to all those whose safety the landlord ought to realize may depend exclusively upon the care and skill with which he makes them.

But the problem is complicated by the fact that the liability now under discussion is, at least on the surface, closely analogous to two liabilities enforced by actions of Tort which are either universally or generally limited to those with whom the defendant directly deals; (1) the liability for misrepresentation as enforced in the action of deceit, and (2) the liability of a manufacturer of a dangerously defective product.

(1) If, as has been stated, a landlord's liability for negligence which renders repairs, gratuitously undertaken, inefficient to remove a pre-existing defect, rests upon the deceptive appearance of safety which his act of making the repairs gives to the premises, his conduct may well be regarded as an implied misrepresentation of their true condition. And as such, it may appear that its exist-

[35] See Holmes, J., in Riley *v.* Lissner, *supra*, n. 17, and Nortoni, J., in Finer *v.* Nichols, 175 Mo. App. 525, 157 S. W. 1023 (1913).

ence and extent should be determined by the principles and limitations applied in the action of deceit since that is *par excellence* the appropriate action to enforce liability based on misrepresentation.[36]

But it does not follow that the action to enforce the landlord's liability should be treated as a mere species of the action of deceit. There are many liabilities enforced in actions of tort which, as much as that of the landlord, are based on the deceptive appearance of the safety of property which the defendant has turned over by sale, lease, or gift to another for his use or has permitted another to use or has entrusted to another to be dealt with in some particular way, without disclosing a defect which made it dangerous for such use or dealing. None of these have ever been regarded as falling within the scope of the action of deceit or subject to its peculiar limitations.

No one is liable in an action of deceit for mere failure to disclose a fact, no matter how essential, unless the parties stand to one another in some peculiar relation which requires the exercise of the utmost good faith.[37] But one who sells, leases, or gives property to another for his use is liable for any injury which that other sustains in his person or property by his use of it, if the vendor, lessor, or donor knew that it was so latently defective as to make its use dangerous.[38] And this liability is not restricted to the person to

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[36] See Malone *v.* Laskey, L. R. [1907], 2 K. B., 141, *infra* n. 59.

[37] See Cairns, L. C. in Peek *v.* Gurney, L. R. 6 H. L. 377 (1873).

[38] Vendor of real estate, Palmore *v.* Norriss, Tasker & Co., 182 Pa. 82, 37 Atl. 995 (1897). Manufacturer putting his product on the market, Huset *v.* Case Mach. Co., 120 Fed., 865 (1903) and cases cited therein, Waters-Pierce Co. *v.* Deselms, 212 U. S. 159 (1909). Shopkeeper, Clarke *v.* Army & Navy Stores, L. R. [1903], 1 K. B. 155. Lessor, Cowen *v.* Sunderland, 145 Mass. 363, 14 N. E. 117 (1887); and see cases cited in McKenzie *v.* Cheetham, 83 Me. 543, 22 Atl. 469 (1891). Donor or gratuitous lenders, MacCarthy *v.* Young, 6 H. & N. 329 (1861); Blakemore *v.* Bristol & Exeter Ry., 8 E. & B. 1035 (1858); Gagnon *v.* Dana, 69 N. H. 264, 39 Atl. 982 (1897). In Clarke *v.* Army & Navy Stores, the vendor was held bound to disclose its knowledge that other cans of the same lot had exploded. In Shubert *v.* Clark Co., 49 Minn. 331, 51 N. W. 1103 (1892), a manufacturer was held liable to an employee of a subvendee, under whom one of its ladders broke, because when it shipped the ladder it knew that it came from stock, part of which was made of defective timber, though it did not know that this particular ladder was so made, and in French *v.* Vining, 102 Mass. 132 (1869), a vendor was held liable for not disclosing that a part of his hay was bad and unfit for fodder, though he had tried to remove the bad from the good before selling and honestly thought he had succeeded.

This cannot be explained on the ground that the relation of vendor and vendee

whom the property is sold, leased or given. It extends to all whom such person permits to use it in his right or to whom he in turn sells, leases or gives it.[39]

Indeed, if the defect be one which makes its use dangerous to persons other than those who are themselves using it, the liability includes such others, if injured by its use.

But the liability in deceit is limited to the very person to whom the false statement is made for the purpose of inducing him to act in reliance upon its truth and who acts upon it in the very manner intended.[40]

It is submitted that the principles of the action of deceit should not be extended beyond its own particular field, determined by its history and purpose. Originally it lay only between parties to a contract, induced by the false statement. The plaintiff's injury was pecuniary or proprietary, the loss of some benefit which he had been led to expect from his bargain or some unexpected ex-

is one which requires the exercise of the utmost good faith. On the contrary it is the typical relation in which the parties deal at arms length.

[39] Lessors of real estate, McKenzie v. Cheetham, *supra*, n. 35; Vendors. Lewis *v.* Terry, 111 Cal. 39, 43 Pac. 398 (1896); Skinn *v.* Reutter, 135 Mich. 57, 97 N. W. 152 (1903); Wellington *v.* Downer Co., 104 Mass. 64 (1870). In some cases it is held that the vendor is liable, if the article is sold for resale without some label or other mark to show its dangerous character, even though the immediate vendee actually knows its true character, Clement *v.* Crosby & Co., 148 Mich. 293, 111 N. W. 745 (1907); particularly where a statute prohibits its sale unless properly labelled, Stowell *v.* Standard Oil Co., 139 Mich. 18, 102 N. W. 227 (1905); and see Waters-Pierce Co. *v.* Deselms, 212 U. S. 159, 179 (1910). In Bryson *v.* Hines, 268 Fed. 290 (1920), a contractor who had constructed a spur track to a training camp under a contract with the United States, so negligently as to make its use dangerous, was liable to an enlisted man who was injured while being carried over it, though its bad condition was known not only to the government officials but to the plaintiff as well.

[40] Prospectuses put out to sell securities. Peek *v.* Gurney, L. R. 6 H. L. 377 (1873); and Cheney *v.* Dickinson, 172 Fed. 109 (1909); with which compare Andrews *v.* Mockford, L. R. [1896] 1 Q. B. 372, and Greene *v.* Mercantile Trust Co., 60 Misc. 189, 111 N. Y. Supp. 802 (1908). Statements made to induce purchase of property: Wells *v.* Cook, 16 Ohio St. 67 (1865); Thorp *v.* Smith, 18 Wash. 277, 51 Pac. 381 (1897); Marshall *v.* Hubbard, 117 U. S. 415 (1886); Hunnewell *v.* Duxbury, 154 Mass. 286, 28 N. E. 267 (1891); Webb *v.* Rockefeller, 195 Mo. 57, 93 S. W. 772 (1905), 6 L. R. A. (N. S.) 872, with valuable note. Hindman *v.* First National Bank, 112 Fed. 931 (1902); Ashuelot Bank *v.* Albee, 63 N. H. 152 (1884); *contra*, Warfield *v.* Clark, 118 Ia. 69, 91 N. W. 833 (1902); McBryan *v.* Universal Elevator Co., 130 Mich. 111, 89 N. W. 683 (1902), reports required from corporations. So no action of deceit will lie upon false statements made to a mercantile agency in reply to their inquiries and not made for the purpose of securing credit, Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9 (1885).

pense or loss incurred in performing it. In these respects it closely resembled actions on warranties, for the breach of which an action in the nature of deceit was early held to lie.[41]

It is true that the word "warrant" was early understood both by him who gave and him who acted upon it to imply an undertaking to answer for the existence of the fact warranted, while the informal statement was actionable only if the maker knew it to be false.

The obligation of the warranty, therefore, arises out of the consent of the warrantor to be bound by its terms and is consensual. On the other hand, the very informality of a statement, where the word "warranty" was not used, indicated an absence of intent to be bound to its truth. Thus the obligation to answer for an informal statement is not consensual but imposed by the policy of law to punish dishonesty and to protect the public against intentional deception. Therefore, it cannot be said to be a mere extension of the obligation upon a warranty. But the action of deceit gave a new and greater protection to the same interest previously protected only by the binding force of the cabalistic word "warrant," the interest which every man has in his right to rely upon statements which affect the advisability of his entering into some contractual or other relation affecting his pecuniary or proprietary interests.[42]

The limitation of the action of deceit to consciously dishonest and active misstatements is consistent with the judicial purpose to enforce a decent standard of commercial honor, which underlay the recognition of the action of deceit for informal misstatements. It would be ridiculous and futile to attempt to enforce a standard in advance of existing public conscience, by requiring those who are concerned with commercial transactions to put all their information at the disposal of one another.[43]

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[41] Indeed, the modern development of the law of deceit tends to assimilate misstatements intended to induce contractual relations to warranties, and, at least where the action is between persons party to a contract entered into in reliance upon the false statement, there is a marked tendency to give to informal statements substantially the same effect as is given to those whose truth is vouched by the magic word "warrant."

[42] The difference between the two is that the warranty entitles the person to whom it is given to expect the fact to be as warranted, while a mere informal statement only entitles him to whom it is made to rely upon the honesty of him who makes it.

[43] The cases show a constant improvement in commercial ethics. Compare Harvey *v.* Young, Yelv., 20a, (1596); Sherwood *v.* Salmon, 2 Day (Conn.) 128 (1805); and

So, too, the limitation of liability in deceit to those to whom the statement is made and whom the maker intends to act upon it, followed almost inevitably from the close analogy of deceit to actions on warranties.

Since warranties did not run with the goods bought in reliance upon them, it was almost inevitable that it should be held that the right to recover upon a fraudulent misstatement did not pass to one who succeeds to rights acquired in reliance thereon, and that the right to rely on informal statements like the right to rely on the formal word "warrant," should be restricted to him to whom the statement indicates that its maker intends to pledge his faith.

But where not only is the fact misrepresented one on which the personal safety of others depends, but where also the misrepresentation leads to personal injury, the reasons for these limitations may well appear no longer controlling. Where human life and limb are at stake, the question is no longer one of mere commercial ethics.

While the business interests of the public may be adequately protected by requiring good faith from those who choose to speak, courts may well regard the personal safety of the public as sufficiently important to require full disclosure of those facts upon the knowledge of which its safety depends. And where something more than the sale or use value of an article bought or sold or the benefit to be derived from a financial transaction is involved, the analogies of warranty may well be ignored, and the liability even for non-disclosure of conditions, known to be dangerous to personal safety, should be held to extend to all those to whose safety a knowledge of the actual conditions is obviously necessary and who sustain personal injury through their ignorance thereof.

It is therefore not surprising to find that where the misrepresentation, whether positive or implied, whether active or through mere non-disclosure, is of a fact upon which the personal safety of others is or should be known to depend, and where personal injury has resulted directly or indirectly from the misrepresentation, the courts have consistently ignored the limitations which they have as consistently applied where the injury threatened and resulting is merely the loss of some pecuniary benefit, that would have ac-

Gordon *v.* Parmelee, 2 Allen (Mass.) 212 (1861); with Pearson *v.* Lord Mayor of Dublin, L. R. [1907] A. C. 351; and compare Gordon *v.* Parmelee with Roberts *v.* French, 153 Mass. 60, 26 N. E. 416 (1891).

crued from some financial transaction had the statement been true.[44]

In so far as the landlord's making repairs implies a representation that the premises are put safe which is falsified by his negligence, the fact misrepresented is, like latently dangerous defects not disclosed by a vendor, lessor or donor of property, one which primarily concerns the safety of those who use the premises rather than its value. And where the action is to recover for personal injury re-

[44] It is submitted that the proper classification of the cases to which these limitations should apply and those to which they should not, depends upon the nature of the injury sustained and not solely upon the nature of the injury likely to result from the reliance upon the misstatement.

Thus the mere non-disclosure of a defect in an article sold, no matter how obviously it affects the safety of its use, is not actionable if, it being discovered after the property has passed into the hands of the purchaser, the only loss sustained is the lessened resale or use value of the property caused by the defect. But if the property is used in reliance upon its apparent fitness for use and such use causes physical injury to the user, he may recover for the mere failure to disclose the defect. So, also, if property is sold through no matter how positive and fraudulent a misrepresentation of its safe condition, the vendor is not liable to one who buys or leases it from his purchaser, if, its true condition being discovered, it merely lessens the value of the article. But no matter through how many hands the property passes, the vendor is liable to any one who is injured by using it in innocent ignorance of the defect.

Where there is an express positive and fraudulent misstatement even of a fact upon which depends the safety of property for use, an action of deceit has been held to lie. But there is a marked tendency to relax the restrictions universally applied where the loss complained of is the lessened value of the property. Thus in Langridge *v.* Levy, 2 M. & W. 519 (1837) the defendant who had sold a gun to the father of the plaintiff knowing that it was bought for the plaintiff's use, was held liable to the plaintiff through the bursting of the gun which he had misrepresented to his father as made by Nock, a gunsmith, whose product was of the highest class, it, in fact, having been made by much inferior gunsmiths. *Accord*, Cunningham *v.* Pease Co., 74 N. H. 435, 69 Atl. 120 (1908); State to use of Hartlove *v.* Fox, 79 Md. 514, 29 Atl. 60 (1894), where the declaration was held not to show a good cause of action because it did not allege it was natural and probable that one taking care of a horse with glanders would contract that disease; *contra* Carter *v.* Harden, 78 Me. 528, 7 Atl. 392 (1886), where one selling as kind and gentle a horse which he knew to be vicious was held not liable for injuries to the purchaser's wife, Langridge *v.* Levy, being distinguished on the ground that it did not appear that the vendor understood that the horse was being bought for the wife or her use.

Langridge *v.* Levy has given infinite trouble to judges and text writers. It is submitted that the decision can be supported only by recognizing that where personal injury naturally results from the misrepresentation, the liability is more extensive than where it causes only pecuniary loss. It seems obvious that the son, to whom the purchaser had given the gun, could have maintained no action of deceit, had he sustained no other loss than the difference between the value of a Nock gun and such a gun as was actually given him.

sulting from its use, directly or indirectly due to such misrepresentation, the liability should be at least as extensive in the one case as in the other and should not be restricted within those limitations which even in the action of deceit itself are only consistently applied where the resulting harm is pecuniary disappointment.

(2) It is more difficult to distinguish the liability of a landlord negligently making repairs, whether gratuitously or for a benefit to him as landlord, from that of contractor guilty of similar negligence in making repairs "for hire" in the course of his trade. Such a contractor is generally said to share the immunity which the majority of common-law jurisdictions have conferred on manufacturers, whom the course of decision in the last few years has relieved of any liability to persons other than their immediate vendees for carelessness or unskilfulness either in workmanship or in choice of materials.[45]

It may be conceded that the mere fact that the work is done by a landlord, or is done by him gratuitously rather than for a benefit moving to him as landlord, affords no logical basis for any distinction in the character of the obligation or in its extent. But it is submitted that this immunity is itself to be justified, if at all, as economically necessary rather than as legally sound. In so far as it professes to rest upon authority, it is generally, if not always, based upon *Winterbottom* v. *Wright*.[46] Now *Winterbottom* v. *Wright* involved no question of liability for misfeasance; the plaintiff's injury was due to the defendant's pure non-feasance, — his failure to make repairs required by his contract with the plaintiff's employer. The case came up on demurrer to the plaintiff's declaration, which alleged as his sole right to recover, his knowledge of and reliance upon this contract to which he was obviously not party. But this was overlooked and certain *dicta* of Baron Alderson and Lord Abinger were seized upon to torture the case into an authority for the doctrine that when work is done under a contract, or goods are made and sold, the liability for negligence in perform-

[45] The defendant was a contractor not only in Winterbottom *v.* Wright but also in Earl *v.* Lubbock, L. R. [1905] 1 K. B. 253, Curtin *v.* Somerset, 140 Pa. 70, 21 Atl. 244 (1891); Congregation *v.* Smith, 163 Pa. 561, 30 Atl. 279 (1894), and Daugherty *v.* Herzog, 145 Ind. 255, 44 N. E. 457 (1896), in all of which the contractor was held not to be liable for negligence after his work had been accepted by the person with whom he had contracted to do it.

[46] 10 M. & W. 109 (1842).

ance or manufacture is restricted to those who are party to the contract or sale.[47]

The full recognition of this doctrine has been comparatively recent. Many early cases had held the negligent maker of various articles liable to persons, who, while using them, were injured by their latently dangerous condition, even though they had not bought the article directly from the makers and thus stood in no privity of contract to them.[48] All of these cases had certain features in common. The article was one which unless carefully made would be dangerous for the very use for which it was sold. It was one whose actual condition could not be discovered by any inspection which either the user or those through whose hands it passed to him could be required or expected to make and which must, therefore, be used in exclusive reliance upon its good workmanship.

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[47] Baron Alderson's statement, p. 115, that "if we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty," is sound when applied to the facts of the case before him, — and he says nothing to suggest that he intends it to apply to any other situation.

The *dictum* of Lord Abinger, 10 M. & W. 109, 114, 115 (1842) — an able advocate but never regarded as a great judge — goes farther: He says, "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. ... There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract." As an illustration of this principle, he then says, "Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a person, who was not privy to the contract entered into with him, can maintain any such action." It seems strange that the text writers and courts who have since attached so much importance to this *dictum*, have not noticed that nine years after it was pronounced it was completely discredited by Marshall *v.* York, Newcastle & Berwick Ry. Co., 11 C. B. 655 (1851) which decided that just such an action could be maintained.

For a more extended discussion of this case and of the prevalent judicial misconception of its effect, see the author's "Basis of Affirmative Obligations, in the Law of Torts," 53 U. of PA. L. REV. 209, 273, 337, (1905), especially pp. 281 to 285 and its citation by Cardozo, J., in MacPherson *v.* Buick Motor Co., 217 N. Y. 382, 392, 111 N. E. 1050 (1916).

[48] Thomas *v.* Winchester, 6 N. Y. 397 (1852), belladonna labeled as extract of dandelion; Norton *v.* Sewall, 106 Mass. 143 (1870), laudanum sold as rhubarb; Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154 (1885), bad devilled crab supplied by a caterer; Dixon *v.* Bell, 5 M. & S. 198 (1816), mulatto girl of thirteen sent to fetch a gun left loaded. George *v.* Skivington, L. R. 5 Ex. 1 (1869), hairwash; Parry *v.* Smith, L. R. 4 C. P. D, 325 (1879), gasfitters leaving leak in gas pipes.

But, refusing to recognize that these decisions implied a general principle imposing liability wherever these conditions exist, courts, determined to deny the existence of any such principle but, reluctant to disapprove or overrule these cases already decided, chose to regard them as imposing peculiar and exceptional liabilities, because of the particular purpose which the use of the various articles was to serve, — as that it was to preserve, destroy or affect human life or because of some extraordinarily dangerous quality, which they were arbitrarily assumed to possess.[49]

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[49] See Sanborn, J., in Huset *v.* Case Threshing Machine Co., 120 Fed. 865, 870 (1903). "There are three exceptions to this rule. The first is that an act of negligence of a manufacturer or vendor [of an article which is imminently dangerous to the life or health of mankind] which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life is actionable by third parties who suffer by the negligence." Very often the duty of a careful manufacturer is said to be confined to articles inherently dangerous, Heizer *v.* Kingsland, 110 Mo. 605, 19 S. W. 630 (1892); or intrinsically dangerous to life or property as in Lebourdais *v.* Vitrified Wheel Co., 194 Mass. 341, 80 N. E. 482 (1907).

In determining whether a duty to exercise care should be imposed, courts should and do consider the interests both of those on whom it is to be laid and those for whose protection it is required. It may, therefore, be proper to require care in the manufacture of an article, which if used for purpose for which it is sold is likely, unless carefully made, to do serious harm to life or limb or even to property, while imposing no duty to exercise care in making an article which, if defective, may be less valuable or less convenient for use but which is unlikely to do serious harm except under peculiar and exceptional circumstances.

But even if the duty of careful manufacture is to be restricted to those articles which, if defective, are likely to do serious harm to those who use them for the purpose for which they are sold as appropriate, it is purely arbitrary to deny the extra-hazardous nature of an article unless it be a drug, explosive, food-stuff or fire-arm, and so, capable of being inaccurately described as designed to preserve, destroy, or affect human life, as in Liggett & Myers *v.* Cannon, 132 Tenn. 419, 178 S. W. 1009 (1915) where it was held that the makers of chewing tobacco were not liable for negligence which permitted dangerous foreign substances in their "plugs" because chewing tobacco was not food since "it does not tend to build bodily tissues and as to the average adult its tendency is usually thought to retard the building up of fatty tissues"; and Hasbrouck *v.* Armour & Co., 139 Wis. 357 (1909); with which compare Pillars *v.* Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918); and Armstrong Packing Co. *v.* Clem, 151 S. W. 576 (Tex. Civ. App., 1912), *infra* note 51.

It seems almost ridiculous to contend that a devilled crab, Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154 (1885), or an effervescent drink put up in bottles not stout enough to prevent their explosion, O'Neill *v.* James, 138 Mich. 567, 101 N. W. 828 (1904), or a floor varnish, Thornhill *v.* Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474 (1915), is more dangerous unless carefully selected and compounded or put up, to him who eats, opens, or uses it, than a platform over the moving machinery of a threshing machine is to the farm-hand who is to stand upon it, or an emery wheel which

And these exceptions,[50] thus illogically and arbitrarily created to bring this judicial innovation into apparent conformity with previous decisions, have been as illogically applied and extended.[51]

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revolves at a very high rate of speed is to him who operates it if care is not taken to make it substantial and free from flaws.

[50] The liability of a manufacturer who sells his product without disclosing a latent defect known to him or who fails to disclose facts which to his knowledge make the existence of such a defect probable is not peculiar to those who sell their own product. All vendors, whether manufacturers, wholesalers or retailers, are equally liable not only to their immediate vendees but to all persons who use the articles in the right of the purchaser. See *supra*, note 39.

[51] Thus in Herman *v.* Markham Air Rifle Co., 258 Fed. 475 (1918), it was held that an air rifle sold as a children's toy was intrinsically dangerous, whether because, in supposed analogy to fire-arms, it was regarded as intended to destroy human life, or because the fact of the accident proved that it was dangerous, is not clear. Chewing tobacco was held in Pillars *v.* Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918) to be intrinsically dangerous because, like food, it was to be taken into the mouth and chewed. The bottling of effervescing drinks was held to be intrinsically dangerous because past experience had shown that unless care was taken in bottling them, they were apt to explode when opened. Grant *v.* Graham Bottling Co., 176 N. C. 256, 97 S. E. 27 (1918). In Thornhill *v.* Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474 (1915) the Massachusetts Court holds that one who puts out a floor varnish as his own, though bought from another maker, is presumed to know that the ingredients from which it is compounded make it inflammable and so intrinsically dangerous. It is not clear whether this presumption is rebuttable or is a conclusive presumption of law. If the latter, it throws upon those who manufacture or sell as their own, chemical compounds, a duty to know its qualities. If, as is possible, one of the reasons for denying the liability of a manufacturer to persons other than his vendee lies in the fact that the change of manufacturing conditions from small shops where the work was done under the owner's eye, to large factories makes a rigid application of the maxim *respondeat superior* unduly harsh, this decision can be supported on the ground that, while it may be a hardship to hold a manufacturer liable for the mere operative negligence of the innumerable workmen in his factory, yet it is not too much to require him to know the effect of the formula of any compound which he makes. This should equally apply where the defect is in the design or plan of construction adopted by the manufacturer.

In Armstrong Packing Co. *v.* Clem, 151 S. W. 576 (Tex. Civ. App., 1912), it was held that soap was an inherently dangerous substance because the manufacturer must have known that it contained ingredients "which unless neutralized by saponification" would remain poisonous, but compare Slattery *v.* Colgate, 25 R. I. 220, 55 Atl. 639 (1903). In Olds Motor Works *v.* Shaffer, 145 Ky. 616, 140 S. W. 1047 (1911) it is held that where the defect is one, which the workmen making it must have discovered during the process of manufacture, though concealed when the article was completed, the knowledge of the working force must be imputed to the manufacturer so as to hold him liable as having sold it with knowledge of its defective character. In Davidson *v.* Montgomery Ward Co., 171 Ill. App. 355, (1912) it was held that a manufacturer of a fly-wheel was bound to know that it was safe before selling it. Though this enables the court to put the manufacturer's liability upon the ground that

The cases following *Gill* v. *Middleton* may be taken to be another exception to this new doctrine, none the less an exception because their inconsistency with it is not expressly recognized. *Gill* v. *Middleton* was decided before this undue extension of the principle correctly applied in *Winterbottom* v. *Wright* had come into full vogue. It was natural that the court gave no thought to it and it was equally natural that the American courts, which with substantial unanimity have instinctively perceived the common-sense justice of the decision in that case, should have continued to follow it even after they had adopted this new and fashionable restriction on the liability for careless and unskilful manufacture, without inquiring whether the two were logically consistent with one another.

As they thus tacitly recognize another exception to the new doctrine, it is submitted that it is the exception and not the doctrine which is in accord with general common-law principles and that any exception, however arbitrary and fortuitous, to a doctrine so illogical and ill-founded, is so much saved to sound law.

It may be suggested further that, if the restriction of a manufacturer's liability for bad workmanship to those who buy his product from him is to be justified only by economic necessity,[52] even those courts which think it necessary to encourage manufacture, by relieving those engaged therein from any real responsibility for the exercise of reasonable care and decent consideration for the safety of the consumers on whose patronage they depend, may not think it equally necessary to encourage landlords, — a class traditionally

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he sold with knowledge of its dangerously defective character, it substantially repudiates the immunity in Huset *v.* Case Threshing Machine Co., as effectively as does the powerful and accurately reasoned opinion of Cardozo, J., in MacPherson *v.* Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

[52] See Paxson, C. J., in Curtin *v.* Somerset, 140 Pa. 70, 80, 21 Atl. 244 (1891). "If a contractor who erects a house, ... a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions." See the very similar language of Stirling, L. J., in Earl *v.* Lubbock, L. R. [1905], 1 K. B. 253, 259. So Sanborn, J., says in Huset *v.* Case Threshing Mach. Co., 120 Fed. 865, 867 (1903): "A wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines."

well able to take care of themselves, and of late generally unpopular, — by adding this new immunity to those, with which the common law had already so richly endowed them.

It is perhaps significant that, while many countries have indirectly subsidized manufacturers at the expense of their consumers by enacting protective tariffs, no subsidies have been granted to landlords, either directly out of the public funds raised by general taxation, or indirectly by transferring the burden of taxation from them to their tenants. Indeed, even at those times when the lack of adequate housing has been most acute, whatever legislation there has been has looked toward preventing landlords from exploiting the situation by exacting exorbitant rentals rather than to aiding them in building more houses.

IV

American courts have been substantially unanimous in citing *Gill* v. *Middleton* with approval and accepting the general principle announced in its opinion.

In the great majority of cases in which this principle has been applied the injury has been to the tenant or his property.[53] There are comparatively few cases which have presented the question of the landlord's liability to persons other than the tenant, injured while using the premises in the tenant's right. In all but one of such cases American courts have permitted a recovery. In most of them the successful plaintiff was an adult or infant member of the tenant's family, such as his wife[54] or child.[55] In only a very few

[53] Sparks *v.* Murray, 120 Ark. 17, 178 S. W. 909 (1917); Mann *v.* Fuller, 63 Kan. 664, 66 Pac. 627 (1901); Michael & Bros. *v.* Billings Co., 150 Ky. 253, 150 S. W. 77 (1912); Peerless Co. *v.* Bagley, 126 Mich. 225, 85 N. W. 568 (1901); La Brasca *v.* Hinchman, 81 N. J. L. 367, 79 Atl. 885 (1911); Horton *v.* Early, 39 Okla. 99, 134 Pac. 436 (1913); Ara *v.* Rutland, 172 S. W. 993 (Tex. Civ. App., 1915); Wertheimer *v.* Saunders, 95 Wis. 573, 70 N. W. 824 (1897), all cases where the injury was to the tenant's property. Charney *v.* Cohen, 94 N. J. L. 381, 110 Atl. 698 (1920); Rowan *v.* Amoskeag Co., 109 Atl. 561 (N. H., 1920), *semble*. Eblin *v.* Miller, 78 Ky. 371 (1890), *semble*, in which the tenant sustained personal injuries.

[54] Upham *v.* Head, 74 Kan. 17, 85 Pac. 1017 (1906), facts substantially similar to those in Gill *v.* Middleton; Carlon *v.* City Savings Bank, 82 Neb. 582, 118 N. W. 334 (1908), 85 Neb. 659, 124 N. W. 91 (1909); Little *v.* McAdaras, 38 Mo. App. 187 (1889), facts

[55] Salvetta *v.* Farley, 123 N. Y. Supp. 230 (1910); Petroski *v.* Mulvanity, 78 N. H. 252, 99 Atl. 88 (1916), *semble*; Rosenberg *v.* Zeitchik, 52 Misc. 153, 101 N. Y. Supp. 591 (1906).

was the plaintiff a subtenant or a business invitee or bare licensee of the tenant. In all cases in which the landlord has been held liable,[56] *Gill* v. *Middleton* is accepted as authority for the maintenance of the action, with little or no discussion of its reason or the extent of the liability therein imposed. In many of them there is the curious tendency to use the word "tenant" in its popular rather than its legal sense and, like Justice Ames in *Gill* v. *Middleton*, to speak of a member of the tenant's family, particularly his wife, as the "tenant" or "lessee," though it is most unusual that premises should be leased to the husband and wife, and it is therefore altogether improbable that both man and wife were actually tenants. In some of these cases, it appeared, from the facts alleged or proved, that the plaintiff had joined with the tenant in complaining of the need of repairs or had at least been present when the landlord promised to make them. In others it did not appear that the plaintiff knew that any promise had been given or indeed that there had been any definite promise

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substantially identical with those in Riley *v.* Lissner, *supra*, n. 17; Finer *v.* Nichols, 175 Mo. App. 525, 157 S. W. 1023 (1913); Miller *v.* Rehder, 35 Pa. Sup. 344 (1908); Callahan *v.* Loughran, 102 Cal. 476, 36 Pac. 672 (1894) *semble*; O'Dwyer *v.* O'Brien, 13 App. Div. 570, 43 N. Y. Supp. 815 (1897), *semble*.

In Callahan *v.* Loughran recovery was denied because while the declaration averred that the tenant's wife "believed the work was completed also, it is not averred that it was so in fact, or that defendant so represented or considered it," p. 482, while in O'Dwyer *v.* O'Brien the plaintiff was held guilty of contributory negligence; see also, Schoppel *v.* Daley, 112 La. 201, 36 So. 322 (1904), *infra*, note 65.

[56] Broame *v.* N. J. Conference, 83 N. J. L. 621, 83 Atl. 901 (1912), employees of subtenants living on premises; see Malone *v.* Laskey, *infra*, McKenna *v.* Grunbaum, 33 Idaho, 46, 190 Pac. 919 (1920), subtenant injured by elevator negligently installed by landlord during the lease to his tenant; Stamm *v.* Purroy, 170 App. Div. 584, 156 N. Y. Supp. 415 (1915), *semble*, plaintiff resided with the lessee, recovery denied because it was not proved that the landlord had attempted to make the needed repairs; Byers *v.* Essex Inv. Co., 281 Mo. 375, 219 S. W. 570 (1920), *semble*, recovery was denied to sub-lessee because there was no evidence that the landlord had repaired the railings whose collapse caused her injury; *cf.* Galvin *v.* Beals, *supra*, n. 18.

In R. C. H. Covington Co. *v.* Masonic Temple Co., 176 Ky. 729, 197 S. W. 420 (1917), the defendant landlord made certain improvements in consideration of the tenant's paying an additional rental, *cf.* Feeley *v.* Doyle, *supra*, n. 22. The lease expiring, a new lease was executed to the same partnership, though one of the partners had died during the original term. It was held that the defendant's liability for negligence in making the improvements was limited to injuries sustained during the original term, and that his liability for injuries sustained during the second term depended upon his knowledge, at the time he delivered possession thereunder, that the improvements had been negligently made and so created a latent and dangerous defect in the premises.

antecedent to the landlord's making the repairs after learning of the need of them. In those where the plaintiff was an adult member of the tenant's family, it is highly probable that he or she knew that the landlord had made the repairs and accepted that fact as an assurance of safety, but in some of the cases the plaintiff was a child too young to recognize such an implication, even if old enough to realize that it was the landlord who had made them. In none of them was any importance attached to the plaintiff's presence or absence when the promise, if any, was made, or to his knowledge or ignorance of the landlord's having made it. In *Hill* v. *Day & Foss*[57] the plaintiff, a sublessee, was denied recovery because there was "no evidence that the plaintiff was a party to his [the landlord's] gratuitous undertaking, or had any knowledge of it before the accident. . . . It must be proved at least that she had knowledge of his undertaking, otherwise no confidence could have been induced in her by his acts."[58] It is knowledge of the fact

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[57] 108 Me. 467, 81 Atl. 581 (1911).

[58] King, J., p. 471. Justice King evidently does not regard the landlord's obligation as a mere implied term of his promise and so consensual and limited by the principles of contract law, for clearly mere knowledge that a party to a contract has attempted to perform his contract instead of repudiating it gives no right to one not a party thereto to rely upon it and then to complain that he has been injured because the attempted performance has been imperfect.

It is submitted that it was not necessary that the plaintiff, if a member of the tenant's family or a guest or sub-lessee, should know that the landlord had made repairs and so should have consciously relied upon his assurance that the premises were safe for his use. It should be enough that the landlord ought to have known that the tenant would rely upon his making them as justification for throwing the premises open to his family or guests or for subletting them without either making such repairs himself or giving notice of the defect. The element of "confidence imposed," which in the notes to Coggs *v.* Bernard, Smith's L. C., 6 Am. ed. 335, is said to be "a sufficient legal consideration to create a duty in the performance" of the voluntary undertaking, is supplied by the tenant's confidence which misleads him into the belief that the premises are safe for the use of others as well as of himself. The landlord must know that the tenant has trusted to him not only his own safety but also the safety of all those whom he has the right to admit to the premises. The word "consideration" is perhaps unfortunate as giving the impression that the obligation like that of a contract depends on privity to the confidence "imposed" or reposed. But it is submitted that what the annotator had in mind were those numerous cases which held that the payment of a consideration for services had some peculiar effect in requiring care in their performance, though the duty was not confined to the person who paid it but extended to those whose safety depended upon the care with which it was performed. See Pippin *v.* Sheppard, 11 Price, 400 (1822); Gladwell *v.* Steggall, 5 Bing. N. C. 733 (1839); Erle, J., in Dalyell *v.* Tyrer, E. B. & E. 899 (1858); and Marshall *v.* York etc.

that the landlord had made the repair that is here regarded as essential, not knowledge of his promise, certainly not her presence when it was made, still less the fact that she had participated in the complaint and so was considered by the landlord, and had the right to consider herself, a party to the promise he made. This decision does not support *Thomas* v. *Lane*, which held that the authority of *Gill* v. *Middleton* is confined to cases where these facts are shown to exist.

In *Malone* v. *Laskey*,[59] the English Court of Appeal rejected the argument that defendant landlords, by making repairs (which consisted of putting a bracket under an insecure cistern in a lavatory) undertook a duty to make them properly, because they stood in no contractual relation to the plaintiff, and because there was no obligation to make the repairs which were "an entirely voluntary act on their part and (were) not done in the discharge of any duty which they owed to the plaintiff." "The utmost that can be said is that what was done amounted to a representation by the defendants that the plaintiff might safely use the lavatory, and, even if it did amount to such a representation, it was an innocent representation and gave the plaintiff no cause of action"[60] "for there is no evidence that they knew that the bracket was in an unsafe condition when the repairs had been done."[61]

While the injured plaintiff was the wife of the manager of a subtenant, who had been given the privilege of occupying rooms on the premises,[62] the language and reasoning of the court seem equally

Ry., 11 C. B. 655 (1851). Indeed at the time that the note to Coggs *v.* Bernard was written the idea seems to have been prevalent, that a duty to exercise positive care even in a trade or profession required a consideration to support it.

[59] L. R. [1907] 2 K. B. 141.

[60] *Ibid.*, at p. 152, per Gorell-Barnes, Pres.

[61] *Ibid*, at p. 155, per Fletcher-Moulton, L. J. Kennedy, L. J., doubted whether knowledge of the insufficiency of the repairs ought not to be imputed to the defendants, p. 156.

[62] The defendants had let the premises to a firm of law stationers, who sublet a part to a company which permitted its manager and his wife (the plaintiff) to occupy rooms therein. The manager or his wife complained to the tenant that the cistern in the lavatory was insecure. The tenant forwarded this complaint to the landlord, who sent two plumbers, part of their regular staff, to rectify the defect. They placed a bracket under the cistern to support it and as Gorell-Barnes, Pres., said, L. R. [1907] 2 K. B. 141, 150, "were then apparently satisfied that they had left it secure. This unfortunately turned out not to be the fact," and the cistern fell on the plaintiff, seriously injuring her.

applicable to an injury sustained by a tenant, for whom a landlord has gratuitously made repairs. And the decision indicates that the liability for misfeasance in the performance of a gratuitous undertaking is not to be extended, as in America, to cases where, in reliance upon care having been exercised in its performance, the subject matter is used in a way for which such care is required in order to make it safe.

In some jurisdictions the court has not been required to determine a landlord's liability for an injury even to a tenant, caused by his negligent failure to remove a preëxisting physical defect. In the only cases brought before them the landlord's negligence in making repairs or alterations or in rendering some other gratuitous service has created a physical defect not existing previous to his attempt to carry out his undertaking. But in almost all of these cases the nature of the repairs or services undertaken made the creation of this new defect inherently probable, if not certain, unless care and skill were exercised in the performance of the undertaking. The tenant for whom such repairs were made or to whom such services were rendered was therefore aware that some such dangerous defect was at least likely to be created unless they were properly done. When the landlord's negligence does not directly and actively injure the tenant or his property,[63] but merely creates a defect which makes the premises unsafe for the use of persons ignorant of its existence, the factors essential to liability are the same as when the landlord's negligence makes his attempt to remedy a preëxisting defect ineffectual.

The gist of the defendant's liability is that, knowing that the tenant will rely and is entitled to rely on his competence as a sufficient assurance that the premises will be made safe for use, he must know that the safety of those who may rightfully use them will depend upon his exercise of reasonable care and skill. The liability depends upon the tenant's right to rely on the landlord's care and skill. And it seems quite clear that the tenant is as much entitled to expect care to be taken to remove a defect which the landlord has undertaken to remove, as he is to expect that alterations

[63] As in Tarnogurski *v.* Rzepski, 252 Pa. 507, 97 Atl. 697 (1916), where a landlord, who had gratuitously undertaken to repair the water pipes in his building, himself turned on the water for a tenant without any effort to ascertain whether the repairs had been made by a plumber whom he had employed to make them.

will be properly made, or that new floorings, to be substituted for those so decayed as to be beyond repair, will be properly laid.[64]

It is therefore not surprising to find that, in those jurisdictions in which the question came up for decision, the vastly preponderating weight of authority is to the effect that a landlord is as liable for negligence in failing to remove a preëxisting physical defect as for negligence in creating a new one.[65]

There is a noticeable tendency in many American jurisdictions to increase the landlord's obligation to keep the premises which he leases in at least as safe a condition for use, as when he turns them over to his tenant. A number of courts have held that a failure to make internal repairs necessary for the safe use of the premises after notice of their necessity makes a landlord who has covenanted to make them, liable for any personal injury sustained by the tenant or by any member of his family or by any one whom he has rightfully chosen to admit to the premises.[66] In order to

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[64] As in Rehder *v.* Miller, *supra*, note 54.

[65] Horton *v.* Early, Charney *v.* Cohen, La Brasca *v.* Hinchman, *supra*, note 53; Upham *v.* Head, Carlon *v.* City Savings Bank, *supra*, note 54; and Salvetta *v.* Farley, *supra*, note 55. In Finer *v.* Nichols, 175 Mo. App. 525, 157 S. W. 1023 (1913), the court expressly rejects the argument which the defendant's counsel seems to have strongly pressed, that the landlord is answerable for such negligence only in making gratuitous repairs as changes the physical character of the premises for the worse; *contra*, Wynne *v.* Haight, 27 App. Div. 7, 50 N. Y. Supp. 187 (1898), in which the court refused to permit a tenant's wife to recover, on the ground that the landlord's negligence in repairing a ceiling had not caused the injury which resulted from its fall, for the reason that the repairs had not weakened the ceiling but had merely failed to strengthen it; and so had not caused any new defect but merely failed to remedy the old. In the case of Marston *v.* Frisbie, 168 App. Div. 666, 154 N. Y. Supp. 367 (1915), the opinion at first glance appears to reiterate this view but a closer reading of the case shows that the plaintiff's right to recover was denied because the tenant had himself been present while the repairs were being made and had not entrusted the matter to the exclusive control of the defendant, his landlord.

[66] Robinson *v.* Heil, 128 Md. 645, 98 Atl. 195 (1916), plaintiff was an infant child of the tenant, Burke, J., saying, p. 653, "the liability of the landlord to a member of the tenant's family for personal injuries resulting from *such negligent failure* to repair is practically the same as to the tenant himself," but the landlord is not liable unless he has reason to expect that serious injury will result from his failure to repair, Thompson *v.* Clemens, 96 Md. 196, 53 Atl. 919 (1903). Barron *v.* Ludloff, 95 Minn. 474, 104 N. W. 289 (1905), plaintiff had sublet an apartment from the tenant of a house leased by the defendant. "If his negligence in making or failing to make the repairs results in an unsafe condition of the premises, he is liable for injuries caused thereby to persons lawfully upon the premises" per Start, C. J., p. 476; the only authority given for

extend it to such persons, who are obviously not party to the contract, the courts, which have recognized the landlord's obligation to them, do not attempt to give them a false appearance of privity by attaching any importance to their knowledge of the landlord's covenant. They boldly, if perhaps somewhat arbitrarily, treat the liability as based on negligence, and so a tort liability not restricted within those limits appropriate to contractual obligations; the covenant to repair becomes a mere inducement to the relation from which law creates the obligation. The attitude of the Massachusetts courts in treating a tort liability, based on misfeasance, as though it arose out of the promise to repair and so was sufficiently cognate to a contractual liability to require its limitation to those party to the promise or undertaking, thus runs directly counter to the prevailing tendency of American decision.

No jurisdiction, English or American, had prior to *Thomas* v. *Lane* and *Feeley* v. *Doyle* recognized the distinctions declared in them. Nor has any jurisdiction since followed those cases.[67] While Maine requires the plaintiff to have knowledge of the landlord's attempted performance of his gratuitous undertaking, the plaintiff's privity to the undertaking is not regarded as essential. The English Court of Appeal has refused to permit a subtenant to recover for the

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this is Olson *v.* Schultz, 67 Minn. 494, 70 N. W. 779 (1897), in which the defective elevator was retained in the control of the landlord and was for the common use of the landlord, the plaintiff's employees and the tenants of other portions of the building.

Accord: Ashmun *v.* Nichols, 92 Oreg. 223, 178 Pac. 234 (1919), where the tenant himself was injured; Mesher *v.* Osborne, 75 Wash. 439, 134 Pac. 1092 (1913), action by tenant to recover for death of infant child. In Lowe *v.* O'Brien, 77 Wash. 677, 138 Pac. 295 (1914), the agreement was made during the lease upon the threat to move out unless the landlord make the premises safe. In these cases it was held that the landlord's promise to repair an open defect "absolved the tenant from an assumption of risk" in analogy to the promise of an employer to repair a defective tool or appliance. See also, *accord*, Stillwell *v.* So. Louisville Land Co., 22 Ky. Rep. 785, 58 S. W. 696 (1900), and Schoppel *v.* Daly, 112 La. 201, 36 So. 322 (1904), where, however, the landlord had not only agreed to make the repairs but had made them "to the extent which she deemed to be a compliance with her obligation . . . when the workmen left it was an assurance to the lessees [the plaintiff was the wife of the lessee] that everything was in order." Per Nicholls, C. J., p. 212.

[67] Thomas *v.* Lane is quoted with apparent approval by Fellows, J., in his minority opinion in Sorenson *v.* Kalamazoo Sales Co., 201 Mich. 318, 167 N. W. 982 (1918), but the case did not require the court to adopt or reject its doctrine, the majority of the court holding that the repairs were made by and under the control of the tenant and not by the defendant landlord.

injury due to the insufficiency of repairs which the landlord had gratuitously made. But the reasons given are as applicable to an injury to a tenant to whom the landlord had gratuitously given his express promise to repair and the facts in their essence differed from those in *Gill* v. *Middleton* only in the fact that the subtenant was not present when the landlord made whatever promise he gave, though the tenant had merely transmitted the subtenant's complaint and the subtenant knew of the landlord's attempt to make the repairs.

In no case before or after *Feeley* v. *Doyle* is there any suggestion that the landlord's obligation to use care in making repairs is, by the fact that his promise is made upon a consideration moving to him as landlord, extended to persons not party to the consideration and to whom he would owe no duty had the repairs been gratuitously performed.[68] Whatever credit attaches to this invention belongs exclusively to the Massachusetts Supreme Judicial Court.

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[68] No jurisdiction other than Massachusetts has held that a landlord gratuitously making repairs is liable only if guilty of gross negligence. Indeed in some cases a duty is said to be "cast upon him to see that the repairs are made so as not to injure the tenant and the rule concerning independent contractors has no application," Bland, J., in Vollrath *v.* Stevens, 199 Mo. App. 5, 13, 202 S. W. 283 (1918). Other courts hold that "he can not absolve himself from liability by employing an independent contractor to do the work, if the work to be done is attended with danger to the tenant." Covington Co. *v.* Masonic Temple, 176 Ky. 729, 734, 197 S. W. 420 (1917); *aliter* where the repairs do not, like the putting on of a new roof, as in Covington *v.* Masonic Temple, *supra*, involve an obvious risk of injury unless special precautions are taken, but are ordinary repairs requiring no special care or skill for their safe performance, Eblin *v.* Miller's Ex., 78 Ky. 371 (1880). In those jurisdictions which do not follow the modern tendency to make one employing an undoubtedly independent contractor liable if the work entrusted to him is inherently dangerous, unless special precautions are taken, the landlord is not held liable for the independent contractor's failure to take such necessary precautions, Bains *v.* Dank, 199 Ala. 250, 74 So. 341 (1917).